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No. 1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BEN CUTLER, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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This case involves only the exercise of the Chancellor's discretion "to do equity in a particular situation" by granting or denying attorneys' fees to the prevailing party, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 167. The District Judge who had tried the suit on which petitioners' claim for attorneys' fees was

based declined, in a considered opinion, to make such an award. In the Court of Appeals the same panel which had decided the underlying case unanimously affirmed this exercise of discretion. A petition for rehearing en banc was unanimously denied, "no active Circuit Judge having requested that a vote be taken on the suggestion that the case be reheard en banc." App. p. 9 *infra*.[1] There is no occasion for further review.

Petitioner Cutler brought this case on his own behalf, and assertedly, on behalf of a class of members of respondent unions limited to those who were also orchestra leaders and employers. The theory of Cutler's complaint was that since he was an employer, § 302 of the Labor Management Relations Act, as amended, 29 U.S.C. § 186, prohibited him from collecting and transmitting to the unions, and the unions from receiving, certain work taxes, as required by the unions' bylaws. The District Court sustained that contention as to Cutler, but in the same opinion ruled that his suit was not a proper class action, 211 F. Supp. 433, 443-446 (S.D.N.Y.), a ruling from which no appeal was ever taken. The Court of Appeals affirmed the holding of illegality, 316 F. 2d 546 (C.A. 2); and this Court subsequently denied *certiorari*, 375 U.S. 941. The other petitioners here were additional plaintiffs in the *Cutler* case, but judgment was ultimately entered against them.

Petitioners' application for counsel fees asserted two theories: (1) that the *Cutler* decision had created

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[1] Despite the requirements of Rule 19 of this Court, Petitioners failed to print the Opinion and Judgment of the Court below. They are reprinted as an appendix to this memorandum, together with the orders denying rehearing.

a fund from which attorneys' fees should be awarded; (2) that the defendants had been benefited by the *Cutler* decision. The District Court carefully considered these contentions and rejected them. The short answer to the fund theory was that the judgment in the *Cutler* case neither created a fund, nor established by *stare decisis* any interest in a fund. (Pet. pp. 22-24). On the basis of the District Judge's examination of each of the asserted claims of benefit, he concluded that "No benefits were conferred upon the defendants sufficient to warrant the exercise of the Chancellor's discretion." The District Judge noted that the plaintiffs did not purport to sue on behalf of the membership as a whole, but on behalf of a small group, asserted to be employers,[2] and that any financial benefit accrued to that group at the expense of the whole membership. Insofar as the asserted benefit was knowledge that a course of conduct constituted a criminal violation, the Court pointed out that it was as much a violation for the plaintiffs as for the defendants and that it was improper to require the defendants to pay attorneys' fees for a mutual benefit. Finally the District Court held that plaintiffs could not claim counsel fees on the theory that the *Cutler* decision had caused the Federation to change its fiscal policy, since plaintiffs themselves had sued to enjoin the bylaw provision which effectuated that change. Pet. pp. 24-26.[3]

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[2] As the Court of Appeals explained in the companion *Carroll* case, that group consisted only of "orchestra leaders in the single engagement field who never act as sidemen", Pet. p. 52, n. 1. It had been stipulated that this group was at most 2 per cent of those members who ever acted as leaders in the single engagement field. This itself, of course, is a fraction of the Federation's membership.

[3] The effort ultimately proved unsuccessful. *Musicians Federation* v. *Wittstein*, 379 U.S. 171.

As the application for counsel fees invoked "individualization in the exercise of a discretionary power", *Sprague* v. *Ticonic National Bank, supra,* at 167, it is not surprising that petitioners were unable to cite any decisions of this Court or of the Courts of Appeals in conflict with the decision below. They nevertheless assert the existence of a "conflict with the decisions in other circuits", citing only a note in 13 *Stanford Law Review* 146 (Pet. p. 12). While we yield to no one in our respect for scholarship, we do not believe that a conflict between a decision of the Court of Appeals and the views of a *Law Review* commentator, even if it existed,[4] would warrant the granting of *certiorari.* The other reasons stated by petitioners for granting the writ are likewise without merit. They claim alternatively that counsel fees should always be granted in suits by members against unions (Pet. pp. 12-13), or at least in suits by members against these defendant unions (Pet. pp. 13-14).[5] The lower courts were entirely justified, to say the least, in refusing to award

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[4] That Note, entitled, *"Shareholders' Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award"*, criticized *Bosch* v. *Meeker Co-op. Light & Power Ass'n,* 257 Minn. 362, 101 N.W. 2d 423 (1960), which had denied an award of counsel fees. The *Cutler* action was not, of course, a shareholder's suit nor, in any other form, a suit brought to protect the interests of the membership as a whole. Moreover, the District Judge herein assumed that counsel fees could be awarded despite the absence of a monetary benefit (Pet. 24-26).

[5] In support of the latter argument, petitioners allege that defendants had violated the law in thirteen separate ways (Pet. pp. 13-14). Since none of these allegations was the subject of the *Cutler* judgment, they are plainly irrelevant to the claim for counsel fees and thus warrant no response here. Indeed, petitioners' argument reinforces the District Court's finding that they are not seeking to benefit defendant unions, but, rather, are pursuing objectives of their own, hostile to the unions' interests.

counsel fees to petitioners because respondents exercised their statutory and constitutional right to defend the legality of their practices "until the last decision of the highest court" (Pet. p. 14).

CONCLUSION

By reason of the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

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